IN THE HIGH COURT OF BOMBAY AT GOA.

COMPANY APPEAL NO. 2-C OF 2000.

Concept Communication Ltd.,
a Company registered under
the Provisions of the Indian
Companies Act, having its
registered office at 608,
Dalamal House, Nariman Point,
Mumbai. ... Appellants.

Versus

M/s. Ravish Infusions Ltd.,
a Company registered under
the Indian Companies Act,
1956, having its registered
office at B.12, La Marina,
Miramar, Panaji. ... Respondents.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, Advocate for the Appellants.

Mr. S.D. Lotlikar, Senior Advocate with Miss S. Naik, Advocate for the Respondents.

Coram : P.V. HARDAS AND
D.G. KARNIK, JJ.

Date : 17th March 2004.

ORAL JUDGMENT (PER KARNIK, J.)

By this appeal the appellant, which is a creditor of the respondent, challenges the Order, dated 5th May 2000, passed by the learned Company Judge, in Company Petition No 5-C of 1998, dismissing the winding up petition. For the sake of convenience, the appellant, who was the petitioner before the learned Company Judge, is hereinafter referred to as 'the petitioner'.

2. The respondent approached the petitioner in

the year 1994 for the job of advertisement in relation to its public issue and the petitioner carried out the job work of advertisement. Against the bill of Rs. 16,89,583.67 for the job of advertisement, the respondent made a part-payment of Rs. 8,49,840/-, in instalments between March 1994 to October 1994. The last part-payment of Rs. 49,840/- was made on 3rd October 1994 leaving a balance of Rs. 8,39,743.67. Two cheques issued by the respondent, one for Rs. 2 lakhs dated 26th April 1994 and the other for Rs. 1 lakh dated 26th March 1994 were, however, dishonoured. By various letters the petitioner demanded payment of the balance amount from the respondent. By a few letters sent in reply, the respondent pleaded financial difficulties and promised to make the payment. However, as the payment was not forthcoming, the petitioner sent a notice under Section 434 of the Companies Act on 20th April 1996, demanding payment and threatening to file winding up petition in the event of default. By a reply of 20th May 1996, the respondent for the first time disputed its liability alleging that the petitioner was negligent in publication of the advertisement on the back page of the Economic Times without taking approval of the lead Manager due to which SEBI issued a show cause notice upsetting the public issue. The respondent made a claim for damages of Rs. 4,32,000/-. In the reply the respondent did not give the details of the

claim for damages of Rs. 4,32,000/-, but only stated that the claim copy was kept with the company's auditors, which would be sent to the petitioner within two weeks. It appears that the details of the said claim were never sent to the petitioner. On account of the failure of the respondent to pay the amount demanded, the petitioner filed a winding-up petition on 4th July 1998. By the impugned Order, dated 5th May 2000, the petition was dismissed. Hence the appellant is in appeal.

3. It is not disputed by the respondent that the petitioner was appointed by it for the purpose of carrying out the work of advertisement in respect of its public issue. It is also not disputed that the petitioner did carry out the said work and submitted bills in the sum of Rs. 16,89,583.67. After giving a credit for the part-payments received, an amount of Rs. 8,39,743.67 is due in respect of the said bills. The learned counsel for the respondent, however, submits that the petition was liable to be and was rightly dismissed. Firstly, the claim was barred by limitation, secondly, the claim was disputed, thirdly, the respondent had a valid counter-claim and fourthly, that the winding-up petition was filed after 2 years of the notice of demand and, therefore, in appeal, this Court should not interfere in the discretion exercised by the

Company Judge in refusing to admit the petition.

4. The job work was carried out in the year 1994 and the bills were submitted in the year 1994 itself. There is no dispute that the respondent made part-payments between March 1994 to October 1994 and the last part-payment was made on 3rd October 1994. By a letter dated 15th February 1995 the respondent promised to make the payment before the closing of the month of March. On 25th November 1995, the respondent wrote to the petitioner company a letter stating:-

> "We are interested to release the fund to your company but at this moment due to overrun in the cost of the project we are badly financially tied up.
>
> We hope to release some of the funds in the month of February 96".

Thus, the letter of 25th November 1995 is not only a letter which acknowledges the liability to pay but also makes a promise to pay in future in the month of February 1996. This letter was written in response to the petitioner's letter, dated 12th October 1995, in which the petitioner had made a demand of the outstanding sum of Rs. 8,39,743.67. In the reply, the respondent did not dispute the correctness of the amount due of Rs. 8,39,743.67, but only pleaded financial difficulties and made a promise to pay in future.

5. The petitioner followed up its demand for payment by further letters. By a reply, dated 27th January 1996, the respondent again admitted its liability and promised to make the payment stating:-

> "It is very much known to you that our Institution is not in a position to disburse the funds as per their sanctions and commitments. Hence we are held up. Therefore you have to bear with us till April '96."

Again in this letter also the respondent did not dispute its liability, but sought further time to make payment till April 1996.

6. It is for the first time, when the statutory notice under Section 434 of the Companies Act was sent by the petitioner on 20th April 1996, that the respondent disputed its liability to make the payment. The respondent went further to make a counter-claim for Rs. 4,32,000/-, without giving any details of the counter-claim, on the ground of negligence on the part of the petitioner in the manner of issuing of the advertisement. In the reply of 20th May 1996, the respondent has stated that the counter-claim for Rs. 4,32,000/- is kept with its auditors and would be sent to the petitioner in the next 2 weeks. However, the same was never sent. This clearly shows that the counter-claim for Rs. 4,32,000/- was not a real counter-claim but a sham and fictitious claim made in

defence to the petitioner's claim, probably to avoid the liability for winding-up. Assuming that the respondent had a valid counter-claim, it still owed to the petitioner a large sum (Rs. 8,39,743.67 less Rs. 4,32,000/- = Rs. 4,07,743.67) which was not disputed.

7. The respondent has been admitting its liability continuously in the correspondence. At least by three communications dated 15th February 1995, 25th November 1995 and 27th January 1996 the respondent promised to make the payment and none of these letters do contain a whisper of a dispute or a counter-claim. The learned Company Judge has held that the letter dated 20th May 1996 written in reply to the statutory notice does not contain an admission. May be so, but we have referred to the three earlier letters each of which contains an unequivocal admission of a liability as well as a promise to pay. In **Shapoor Fredoom Mazda v. Durga Prosad Chamaria and others**, reported in A.I.R. 1961 S.C. 1236, the Apex Court has laid down that acknowledgement of liability need not be in a particular form. The effect of the words used in a particular document would depend upon the context in which the words are used. All the three letters referred to above were written by the respondent in response to the petitioner's letters of demand. None of the replies even contain a whisper of denial of the liability or a

whisper of counter-claim. All of them contain an unequivocal promise to pay. In the circumstances we are of the opinion that the said letters do constitute an acknowledgement within the meaning of Section 18 of the Limitation Act. Each of the letters extend the period of limitation for filing of a suit. The winding-up petition is filed within the period in which a suit could have been filed. Therefore the winding-up petition could not have been dismissed on the ground that the recovery of the debt was barred by limitation.

8. We have already dealt with the contentions of the respondent that the liability was disputed and that it had a valid counter-claim against the petitioner. In our opinion, the counter-claim, made for the first time in the reply, dated 20th May 1996, is an afterthought. It appears to have been made only for the purpose of avoiding the liability of a winding-up petition. Even the details of the counter-claim were not given in the communication or at any time thereafter. Learned counsel for the respondent invited our attention to the previous letter dated 27th March 1996 giving the breakup of the counter-claim, which was made in two debit notes, one of Rs.2,89,950/- and another of Rs. 1,42,500/-. However, the copies of the debit notes are not annexed to the affidavit-in-reply. We are unable to find out any details of the counter-claim even in the

affidavit-in-reply. In the circumstances we hold that the counter-claim is not bonafide and there is no bonafide dispute in respect of the amount due. Even assuming otherwise and setting off the counter-claim against the admitted liability, the respondent still owes to the petitioner a sum in excess of Rs. 4,07,000/-.

9. Learned counsel for the respondent also invited our attention to the averment in the petition that an amount of Rs. 8,49,840/- is due though the amount due was only Rs. 8,39,743.67. This obviously was a clerical mistake. Out of the bills of Rs. 16,89,583.67, Rs. 8,49,840/- were paid by the respondent, leaving a balance of Rs. 8,39,743.67. The petition could not be dismissed on account of this clerical mistake.

10. We are also unable to agree with the submission of the learned counsel for the respondent that, since the winding-up petition was filed nearly two years after the notice under Section 434, the winding-up petition should be dismissed. If the amount was legally due and recoverable, the winding-up petition can be entertained by this Court. The learned Company Judge has not exercised his discretion in dismissing the winding-up petition on the ground that the petition was delayed.

The petition was dismissed holding that the claim was barred by limitation. We are, therefore, not interfering with the discretion exercised by the learned Company Judge, but we have simply come to the conclusion that the claim was within limitation and the claim was admitted by the respondent at least in three letters.

11. Learned counsel for the respondent submitted that the respondent was commercially solvent and that the petitioner had not proved that the respondent was unable to pay the debts. The learned counsel relied upon the decision of the Apex Court in **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd., and another**, reported in (1994) 3 S.C.C. 348, wherein it was held that an Order under Section 433(e) of the Companies Act was discretionary. There must be a debt due and the company must be unable to pay the same. The company must be plainly and commercially insolvent, that is to say, that its assets were such and its existing liabilities were such as to make it reasonably certain – as to make the Court feel satisfied – that the existing and probable assets would be insufficient to meet the existing liabilities. The respondent has not placed on record its balance sheet, profit and loss account or any other material disclosing its existing assets and liabilities. These are the facts which are within the knowledge of

the respondent. Apart from the fact that the respondent is liable to pay a large amount to the petitioner, two of its cheques of Rs. 2 lakhs and 1 lakh each issued on 6th June 1994 and 26th March 1994 respectively have bounced. In the circumstances, it is not possible to prima facie believe that the respondent is commercially solvent. As held by the Apex Court in the case of **M/s. Madhusudan Gordhandas & Co. v. Madhu Woollen Industries Private Ltd.**, reported in A.I.R. 1971 S.C. 2600, it is no defence to the company that it is able to pay but chooses not to pay that particular debt. If the debt is prima facie due, then the company petition would have to be admitted, by passing a conditional order of admission, condition being that if the amount is deposited in the Court, the petition would stand dismissed.

12. In the circumstances, the appeal deserves to be allowed. The winding-up petition deserves to be conditionally admitted. The winding-up petition is, accordingly, admitted conditionally. If the respondent deposits an amount of Rs. 8,39,743.67 in the Company Court within a period of 12 weeks, the petition shall stand dismissed and in that event the petitioner would be relegated to a remedy of a suit. The amount deposited in the Court shall be transferred to the account of the suit, which may be filed by the

petitioner, provided the suit is filed within the period of 12 weeks from the date of the notice of deposit. In the event the amount is not deposited within a period of 12 weeks, the petition shall then stand admitted and the petitioner will then advertise it in two local newspapers, that is, 'Navhind Times' and 'Gomantak Times' and the Government Gazette. The petitioner shall pay the cost of the advertisements and shall also deposit Rs. 2,000/- initially in the Court, towards costs.

13. It is clarified that the observations made in this petition are only prima facie for the purpose of admission and would not be taken into consideration by the Court hearing the suit that may be filed by the petitioner for recovery of money.

(P.V. HARDAS)
JUDGE.

(D.G. KARNIK)
JUDGE.

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